IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. SC12-644

RICHARD MASONE,

Petitioner,

-vs-

CITY OF AVENTURA,

Respondent.
_____/

BRIEF OF PETITIONER ON JURISDICTION

On appeal from the Third District Court of Appeal of the State of Florida

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

Cases

Statutes

PREFACE

This is Petitioner Richard Masone's request for discretionary review of a decision of the Third District Court of Appeal November 30, 2011, reversing an Order denying the City of Aventura's Motion for Summary Judgment, which resulted in a Final Judgment invalidating the City of Aventura's unmanned traffic camera ordinance.

Petitioner, Richard Masone, will be referred to as "Petitioner" or "Masone." Respondent, City of Aventura, will be referred to as "Respondent," or "the City."

STATEMENT OF THE CASE AND FACTS

This case is straightforward as to its facts. The City, like many jurisdictions across the state, enacted an Ordinance to authorize the use of image capture technologies for "monitoring and enforcing laws relating to traffic control signals" (A2). Images taken of vehicles who failed to stop at red lights is reviewed by a City-appointed traffic control review officer (A3, 10-11). A vehicle owner is issued a Notice of Violation (A2).

If an owner contested the Violation, the Ordinance held that the person could request an "administrative hearing for purposes of appeal" before a "Special Master" (A14-15). An aggrieved party could then appeal the Special Master's Final Order to the circuit court (A15).

Masone was issued violation notices in January 2009, for allegedly failing to stop at an intersection monitored by the City's automated cameras (A2). Masone filed a Complaint for Declaratory Relief contending the cameras were an invalid exercise of municipal authority (A2).

The circuit court granted Masone's Motion for Summary Judgment (A3). It reasoned that the Ordinance was an invalid exercise of municipal authority in the absence of express authority from the Legislature to legislate this subject (A3). The Ordinance conflicted with state law, and the City lacked the authority to utilize cameras as the "sole basis" for citations (A3, 5).

In a 2-1 decision, the Third District reversed. The court held that the Ordinance was neither preempted by nor did it conflict with state law (A4-16). The dissenting judge concluded that the Ordinance was both preempted by and in conflict with Florida law (A18-29).

SUMMARY OF ARGUMENT

The Third District upheld the City's Ordinance erecting automated red-light cameras, to cite, adjudicate and punish vehicle owners, all the while outside of the circuit court's jurisdiction, in the City's own administrative proceeding. The decision expressly and directly conflicts with decisions from this Court and another district court of appeal. The Third District misapplied the principles of preemption and conflict, and state law prohibited the City's Ordinance.

As technologies continue to expand, the use of those technologies presents novel legal issues. Multiple state supreme courts in other jurisdictions have recently examined municipal authority regarding these automated, unmanned cameras, and this Court should also do so. The Fifth District held Oral Argument on this exact issue in City of Orlando v. Udowychenko, Case No. 5D11-720 (held April 17, 2012), a reflection that this issue is of statewide importance.

ARGUMENT

THE THIRD DISTRICT COURT OF APPEAL'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS FROM THIS COURT AND ANOTHER DISTRICT COURT OF APPEAL.

This case addresses the intersection of municipal and legislative powers in an area of the law that is rapidly changing with modern technology. Multiple state supreme courts have examined the constitutionality and legality of automated cameras as a means of traffic regulation, adjudication and punishment. See, e.g., City of Davenport v. Seymour, 755 N.W.2d 533 (Iowa. 2008) and Mendenhall v. City of Akron, 881 N.E.2d 255 (Ohio 2008) (upholding ordinances); and State v. Kuhlman, 729 N.W.2d 577 (Minn. 2007) (invalidating ordinance).

This Court should join the Minnesota Supreme Court in invalidating the City's Ordinance. The Legislature may have allowed municipalities to, in isolation, **utilize** automated cameras. There was no authority to utilize these cameras in so many ways that depart from Florida's Uniform Traffic Control Act. The Third District's Opinion conflicts with decisions from this Court and another District Court of Appeal on the principles of both preemption and conflict.

The Legislature enacted Chapter 316 to address two abuses arising from the municipal court system of handling traffic infractions -- the "history of inconsistency of penalties imposed" by the municipal courts and the inconsistency of traffic laws in municipalities around the state. Miller v. City of Indian Harbour Beach, 453 So.2d 107, 112 (Fla. 5th DCA 1984); see also Preamble to Chapter 71-135, where the Legislature identified the problems with the municipal court system that Chapter 316 was designed to address (A18).

Consistent with these concerns, the Legislature adopted two sections which expressly limit the power of a municipality to legislate traffic matters, §316.002, Fla. Stat. (2008), and §316.007, Fla. Stat., so as "to create a **uniform, statewide traffic control system**." State v. Smith, 584 So.2d 145, 147 (Fla. 2d DCA 1991) (emphasis added). Further consistent with this intent, Chapter 316 was to be known as the "Florida Uniform Traffic Control Law." §316.001, Fla. Stat.

Section 316.002 identifies the purpose of Chapter 316 "to make uniform traffic laws to apply throughout the state . . . and uniform traffic ordinances to apply in all municipalities." See Maddox v. State, 923 So.2d 442, 446 (Fla. 2006). Section 316.002 makes it "unlawful for any local authority to pass or to attempt to enforce any ordinance in conflict with the provisions of this chapter." Consistent with that provision, §316.007, like a constitutional provision over traffic matters, declares the principle of uniformity and the supremacy of Chapter 316:

> The provisions of this chapter shall be applicable and uniform throughout this state and in all political subdivisions and municipalities therein, and no local authority shall enact or enforce any ordinance on a matter covered by this chapter unless expressly authorized.

The Legislature has given its authority in limited, enumerated areas, pursuant to §316.008, Fla. Stat.:

> (1) The provisions of this chapter shall not be deemed to prevent local authorities, with respect to streets and highways under their jurisdiction and within the reasonable exercise of the police power, from:

> (w) Regulating, restricting, or monitoring traffic by security devices or personnel on public streets and highways. . . .

The Third District has misapplied this Court's prior rulings, and has only selected certain language from this Court's prior rulings to lead to its conclusion. The court has taken the phrases "regulate[e]" and "restrict," and inserted the phrase "enforce" into their meaning. Moreover, even as to "enforce," the Third District has now given municipalities the license to create their own form of adjudication and punishment with automated cameras, removed from the circuit court. This cannot be supported by this Court's prior opinions.

As to preemption, the Third District stated (A12):

> In order "[t]o find a subject matter expressly preempted to the state, the express preemption language must be a specific statement; express preemption cannot be implied or inferred." Hillsborough Cnty. v. Fla. Restaurant Ass'n, 603 So.2d 587, 590 (Fla. 2d DCA 1992) (citing Bd. of Trs. v. Dulje, 453 So.2d 177 (Fla. 2d DCA 1984)).

This is an incomplete statement of the framework established by this Court. For example, in City of Hollywood v. Mulligan, 934 So.2d 1238, 1243 (Fla. 2006), while this Court **first** noted that express preemption cannot be implied, this Court then **also** emphasized that "[t]he preemption need not be explicit so long as it is clear that the legislature has clearly preempted local regulation of the subject." Id.

(quoting Barragan v. City of Miami, 545 So.2d 252, 254 (Fla.1989) (citing Tribune Co. v. Cannella, 458 So.2d 1075 (Fla.1984)).[1]

The Third District's incomplete statement is an inaccurate statement that misapplied the law. The Third District's analysis of express preemption is one sentence long; the Court simply stated that "[n]either the language in section 316.002 nor section 316.007 demonstrates express preemption by the state" (A12).

The Third District did not address all statutory provisions, and did not examine whether "it is clear that the legislature has clearly preempted local regulation of the subject." The statutory framework makes clear that the Legislature has preempted on many aspects of **how** drivers are ticketed, and **how** they are adjudicated. Section 316.007 requires there to be "express authorization" for any intervention into any area.

Nothing in Chapter 316 -- anywhere -- has given the City the express authority to deviate from Chapter 316 in such a broad manner. As the dissent pointed out, there were four different points of preemption: Chapter 316 addresses the "specific punishment or penalties" for traffic light infractions, as a statutory offense; §316.155, Fla. Stat. (and §318.18, Fla. Stat.), address the punishment of

[1] In Mulligan, this Court held that the ordinance was not preempted by state law. 934 So.2d at 145. This Court held that state law addressing the forfeiture of contraband for **felonies** did not preclude local legislature as to **misdemeanors**. Id. at 145. In the instant case, the City's Ordinance targets the identical conduct as under state law, and adjudicates and punishes in far different ways.

"all traffic infractions"; §318.14(a), Fla. Stat. (2008), identifies the "burden of proof" that "must be applied" for determining guilt for a red light infraction; and Chapter 318 establishes the "procedure" that must be followed, including the qualifications of the person hearing the matter (A26-27).

The Third District has also misapplied the law of implied preemption. The Third District reasoned that, "[d]etermining implied preemption requires that the 'legislative scheme must be **so pervasive** that it **completely occupies the field**, thereby requiring a finding that an ordinance which attempts to intrude upon **that field** is null and void.'" (A12) (all emphases added) quoting Hillsborough County v. Florida Restaurant Ass'n., 603 So.2d 587, 591 (Fla. 2d DCA 1992) (citing Cannella, 458 So.2d at 1077).

The Second District did not provide a citation for its implied preemption definition 20 years ago. The Petitioner has not located a case from this or another District Court with such a (strict) definition. It would make it nearly impossible for a challenging party to ever show implied preemption.

In fact, this Court has reasoned that implied preemption is established where "the state legislative scheme of regulation is pervasive and the local legislation would **present the danger of** conflict with that pervasive regulatory scheme." Sarasota Alliance for Fair Elections, Inc. v. Browning, 28 So.3d 880, 886 (Fla. 2010) (emphasis added).

This is a distinction with a dramatic difference. On one hand, a challenging party has to show pervasiveness and the potential for danger; on the other hand the Second and now Third District requires challenging parties to show this extreme pervasiveness and a complete occupation of a field. As laid out in the dissent, there is a danger of conflict in the City's Ordinance in a plethora of mechanisms.

The City's Ordinance also conflicts with state law. The Majority reasoned that the Ordinance was "consistent, and does not conflict, with any provision" found in Chapter 316, and that the Ordinance "supplements law enforcement personnel in the enforcement of red light infractions. . . ." (A8, 10).

This reasoning conflicts with a recent decision from the Fourth District. See Hoesch v. Broward County, 53 So.3d 1177 (Fla. 4th DCA 2011). In Hoesch, the Fourth District concluded that an ordinance authorizing the destruction of a dog that has killed a single animal "has vitiated the framework for dealing with dog attacks on other domestic animals that is set forth in Chapter 767." Id. at 1181. The County had "regulate[d] an area that is **covered by** state law." Id. (emphasis added). Conflict existed because state law did not merely allow for the destruction of a dog for killing one animal, but had other necessary thresholds.

The "framework" for the punishment and adjudication of drivers running through red lights is also set forth in Chapters 316 and 318. The City has regulated -- in the sense of who can be charged, the basis for charging, and matters of

adjudication and punishment -- in areas covered under state law. Just as the Legislature has established the criteria for when dogs are euthanized, the Legislature has established mandatory criteria for these areas. Under the reasoning of the Third District in the instant case, if the City had enacted an Ordinance defining how dogs are declared dangerous and can be euthanized, but deemed this a code violation, and adjudicated outside of circuit court, there would be no conflict.

The dissent pointed out how the City has vitiated the framework of the Uniform Traffic Control Act, to wit: (1) the City's Ordinance punishes vehicle owners (unless the owner comes forward under the specified conditions), while §316.075, Fla. Stat., only punishes drivers; (2) the Ordinance allows a traffic enforcement officer to review recorded images, while §316.640(5)(a), Fla. Stat., requires personal observation of the traffic infraction; (3) the City punishes according to its own, increased fine schedule, while §316.655, Fla. Stat., provides for a lower, uniform fine; (4) the Ordinance has no burden of proof, while §318.14(6), Fla. Stat., requires infractions to be proven beyond a reasonable doubt; (5) the City utilizes an appointed Special Master, while state law gives an accuser the right to a judicial determination; and (6) the qualifications are far more relaxed under the City's Ordinance for who presides over administrative hearings and determines guilt (A27-28).

The City's all-encompassing legislative scheme shows that the Ordinance and state law cannot co-exist. The City's decision to implement its adjudication and punishment scheme outside of circuit court establishes a dangerous precedent for all citizens of this state, far outside this one area of driving.[2] The Third District has now given its approval to municipalities to expand their power into all areas of civil law via automated cameras, and for municipalities to decide whom to punish and how to do so. This could not have been the intent of Chapter 316 and the voters of this state, as the dissent also made clear when discussing the adoption of Article V in 1973 to ensure uniform courts, and a uniform traffic control law (A18-19). This Court should accept jurisdiction of this case.

As noted above, the Fifth District held oral argument on this issue two months ago. If the Fifth District rules in the challenging citizen's favor, that too would warrant this Court's review of this issue and these cases.

CONCLUSION

For the reasons stated above, Petitioner requests that this Court accept Jurisdiction.

[2] The Majority stated that Masone could have requested an administrative hearing "for purposes of an appeal" (A14). People charged under state law do not "appeal" a charge; they only appeal an adjudication of guilt. The Majority also noted that Masone could appeal the Special Master's order to trial court (A15). Limited appellate review (of that appellate administrative proceeding, no less) circumvents the hearing citizens are entitled to in the first instance.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing was furnished EDWARD G. GUEDES, ESQ., 2525 Ponce de Leon Blvd., Ste. 700, Coral Gables, FL 33134, and SAMUEL J. SALARIO, JR., ESQ., JOSEPH HAGEDORN LANG, JR., ESQ., AMANDA ARNOLD SANSOME, ESQ., 4221 W. Boy Scout Blvd., Ste. 1000, Tampa, FL 33607, by mail, on May 23, 2012.

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CERTIFICATE OF TYPE SIZE & STYLE

Petitioner hereby certifies that the type size and style of the Brief of Petitioner on Jurisdiction is Times New Roman 14pt.

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